Supreme Court, U.S.
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No. 04-902

IN THE

# Supreme Court of the United States

JERRY MURPHY,

*Petitioner*,

v.

METROPOLITAN TRANSIT AUTHORITY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court should grant certiorari in Petitioner's *pro se* case of alleged race and age discrimination, where the decision-makers are either the same race as Petitioner or are in the same age group as Petitioner, where Petitioner has failed to identify any non-protected class employees who were treated more favorably than him, and where Petitioner has failed to offer any evidence of a racial or age-based motive for his employment termination?

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## STATEMENT OF THE CASE[1]

Petitioner filed this lawsuit *pro se* in the 151st Judicial District Court of Harris County, Texas, on September 5, 2003, against the Metropolitan Transit Authority ("Metro"),[2] alleging claims for race discrimination, age discrimination, disability discrimination, retaliation, and defamation. Metro timely removed Petitioner's lawsuit to the United States District Court for the Southern District of Texas, Houston Division on October 28, 2003. On February 13, 2004, Metro filed its Motion for Summary Judgment ("Metro's Motion"). (R. 333-532).[3] On March 22, 2004, the District Court granted Metro's Motion for Summary Judgment, finding no evidence of race or age discrimination. In this regard, the District Court noted that Petitioner's supervisors were either the same race as Petitioner or were, like Petitioner, over 40 years of age. (Petitioner's Appendix 25). The District Court also noted that Metro hired Petitioner at age 57 and fired him approximately two years later. (Petitioner's Appendix 22-23, 25). The District Court also found no evidence that Metro's reason for Petitioner's discharge was a pretext for race or age

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1. Unless otherwise noted, citations set forth herein are to the Fifth Circuit Record.

2. Metro is a public entity established by Texas Civil Statute Article 1118x pursuant to voter approval of a regional referendum held on August 12, 2978. Article 1118x is now codified in Chapter 451 et. seq. of the Texas Transportation Code.

3. Petitioner later abandoned his purported disability discrimination, retaliation, and defamation claims by failing to address them in his Response to Metro's Motion. Instead, Petitioner only briefed his allegations of race and age discrimination.

discrimination. (Petitioner's Appendix 25-26).[4] The Fifth Circuit affirmed the judgment of the District Court, finding

4. Long before the District Court dismissed this case, the EEOC did an exhaustive investigation of Petitioner's allegations and also dismissed them, finding no evidence of discrimination. Specifically, approximately 7 months after Petitioner filed a Charge of Discrimination with the EEOC on or about December 9, 2002, alleging race and age discrimination (R. 411), on July 10, 2003, EEOC Investigator Patricia Zuniga sent Petitioner a Pre-Determination letter, stating that there was no evidence of race or age discrimination. (R. 410, 468-70). In particular, Investigator Zuniga made the following findings: "[t]he evidence does not support the allegation that you were denied a promotion due to your race, Black, and your age, 59. . . . The evidence does not support the allegation that you were terminated because of your race, Black, and your age, 59." (R. 410). Petitioner, who apparently was not satisfied with Ms. Zuniga's findings, filed additional documents with the EEOC in an effort to support his race and age discrimination claims. (R. 386-409, 486-87). Subsequently, on August 1, 2003, Jim Sacher, then Acting District Director of the Houston District Office of the EEOC, issued a Dismissal and Notice of Right to Sue, stating that there was no evidence of discrimination. (R. 385, 466-67). In addition, Mr. Sacher sent Petitioner a cover letter with the Dismissal and Notice of Right to Sue explaining that "you have not provided any tangible evidence that rebuts Metro's defenses and we do not have evidence that the actions taken against you were motivated by you race and/or age, you (sic) charge is being dismissed." (R. 384). Petitioner filed yet another rebuttal letter with the EEOC on August 18, 2003. (R. 381-83, 462-463). Mr. Sacher wrote Petitioner another letter on August 20, 2003, explaining in detail why the information that Petitioner submitted to the EEOC was not evidence of race or age discrimination. (R. 379-80, 457-462). In his August 20, 2003, letter, Mr. Sacher noted that "[b]efore issuing the dismissal, I independently reviewed the information in the investigative file." (R. 379, 457). Further, Ms. Cynthia G. Pierre, Director of EEOC Field Management Programs in Washington, D.C., also sent Petitioner a letter (dated September 10, 2003), stating that she too had independently reviewed the file and found no evidence of race or age discrimination. (R. 378, 455-57).

no evidence that Metro's reason for Petitioner's discharge was a pretext for race or age discrimination. (Petitioner's Appendix at 19-20).

## REASONS FOR DENYING THE PETITION

### I. The Petition Does Not Satisfy This Court's Requirements For Granting Certiorari.

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Rule 10 lists the following examples of the types of cases in which the Court may grant certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal

> question in a way that conflicts with relevant decisions of this Court.

*Id.* Conversely, Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner's Petition should be denied because there are no "compelling reasons" for granting certiorari in this case. This case does *not* involve: (1) a conflict among United States courts of appeals; (2) a conflict between a United States court of appeals and a state court of last resort; (3) a conflict on an important federal question among state courts of last resort; or (4) a conflict between this Court's decisions and the decisions of lower courts. Rather, this case involves nothing more than a garden variety claim of alleged employment discrimination. Moreover, the asserted error in this case consists of nothing more than allegations of erroneous factual findings. Those are precisely the type of allegations which Rule 10 provides are not appropriate for certiorari. Accordingly, Petitioner's Petition should be denied.

## II. The Petition Fails On The Merits.

### A. *Petitioner Failed To Establish A Prima Facie Case Of Race Or Age Discrimination.*

The District Court properly dismissed Petitioner's discharge claims because Petitioner failed to establish a *prima facie* case of race or age discrimination. To establish a *prima facie* case of employment discrimination, Petitioner was required to show that "(1) [he] is a member of a protected class, (2) [he] was qualified for [his] position, (3) [he]

suffered an adverse employment action, and (4) others similarly situated were more favorably treated." *Rutherford v. Harris County, Texas*, 197 F.3d 173, 184 (5th Cir. 1999); *accord Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998). At the District Court, Petitioner presented no summary judgment evidence that "similarly situated" employees outside of his protected class were treated more favorably than him in circumstances "nearly identical" to his. *See Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir. 2000). Not surprisingly, in his Petition for Certiorari, Petitioner fails to identify any evidence in the record establishing that "similarly situated" employees were treated more favorably. Consequently, the District Court properly dismissed Petitioner's discharge claims.

### B. *Metro Had Legitimate Nondiscriminatory Reasons For Petitioner's Discharge.*

In addition to the fact that Petitioner failed to establish a *prima facie* case, the record establishes that Metro had legitimate, nondiscriminatory reasons for terminating Petitioner's employment and that Petitioner has no evidence that they were pretexts for race or age discrimination. Petitioner's employment was terminated because he presented paperwork to Metro for a vanpool that did not exist and stated that the nonexistent vanpool was a "go." (R. 412). By his actions, Petitioner set into motion the vanpool program's mechanisms that resulted in the distribution of reports and processing of documentation for Metro's reimbursement from the Houston-Galveston Area Council[5]

5. The Houston-Galveston Area Council ("HGAC") provides funding for Metro's vanpool program through a grant from the federal government. (R. 335-36).

for financial incentives resulting from the creation of a new vanpool. (R. 412, 424). Thus, Petitioner's actions resulted in the dissemination and publication of erroneous reports and information to both internal Metro management and to external partners, such as the Houston-Galveston Area Council. (R. 412).[6] Moreover, at the time of the incident, Petitioner was already on a performance improvement plan. (R. 429).

### C. *Petitioner Failed To Show That Metro's Reasons Were Pretexts For Discrimination.*

The Fifth Circuit recently explained that an employment discrimination plaintiff who seeks to rebut an employer's legitimate, nondiscriminatory reason for an employment decision must show:

> either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic (mixed-motive[s] alternative).

*Rachid v. Jack In the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

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6. Petitioner erroneously asserts that Metro's reasons for Petitioner's discharge are based upon hearsay. Contrary to Petitioner's assertion, Metro presented the reasons for Petitioner's discharge through business records, which are admissible under Federal Rules of Evidence 803(6) and (8). Further, Petitioner waived any such objection because he neither raised the objection before the District Court nor raised it in his initial brief before the Fifth Circuit. *See In Re Texas Mort. Services Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985) ("issues not raised or argued in the brief of the appellant may be considered waived and thus will not be noticed or entertained by the court of appeals.").

Petitioner failed to satisfy both prongs of the aforementioned standard. With respect to the first prong (i.e., the pretext alternative), Petitioner admitted in his deposition that he submitted paperwork for a van to Metro and stated that the van was a "go," but he contends his actions did not indicate the existence of an active van. (R. 425). Thus, Petitioner asserts that his supervisors were simply wrong or mistaken in their belief that he indicated the existence of an active van. *Id.* However, Petitioner's assertions miss the mark because "[t]he question is not whether an employer made an erroneous decision; *it is whether the decision was made with discriminatory motive.*" *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995) (emphasis added); *accord Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 979 (7th Cir. 2004) ("The employer's explanation can be foolish or trivial or even baseless so long as the company honestly believed in the reasons it offered for the adverse employment action."); *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002) ("The factual issue to be resolved is not the wisdom or accuracy of [defendant's] conclusion that [plaintiff] was an unsatisfactory employee. We are not interested in whether the conclusion is a correct one, but whether it is an honest one."); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) ("In judging whether [defendant's] proffered justifications were 'false,' it is not important whether they were *objectively* false (e.g., whether [plaintiff] *actually* [engaged in misconduct]). Rather, courts only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless."). Thus, Petitioner's assertion that his supervisors were mistaken or that they misinterpreted his actions does not establish that Metro's reasons for his employment termination were pretexts for race or age discrimination.

Petitioner also failed to offer any evidence of a racial or age-based motive for his employment termination. In this regard, it is undisputed that the decision to discharge Petitioner was made by people that were members of Petitioner's protected classes. Petitioner contends that Metro discharged him because of his race and age. The primary person whom Petitioner contends discriminated against him based on race and age is William Pitts, who, like Petitioner is a Black man over 40 years of age. (R. 415-16, 475-76, 492, 499-500). Petitioner also contends that Mr. Pitts' supervisors, Mr. David McMaster and Ms. Evangeline Soto-Chairez, both of whom are over 40, discriminated against him. (R. 499-500).[7] However, it is well settled that there is a strong inference of *no* race discrimination when the plaintiff and the decision-maker are the same race. *See Taylor v. Proctor & Gamble Dover Wipes*, 184 F. Supp. 2d 402, 413 (D. Del. 2002) (finding no race discrimination where the decision-maker and the Appellant were both African-Americans); *accord Haywood v. Lucent Technologies, Inc.*, 169 F. Supp. 2d 890, 912 n.7 (N.D. Ill. 2001); *Anderson v. Anheuser-Busche, Inc.*, 65 F. Supp. 2d 218, 229 (S.D. N.Y. 1999); *Kendrick v. Penske Transp. Services, Inc.*, No. Civ. A. 98-2289-KHV, 1999 WL 450886, at * 8 (D. Kan. Apr. 13, 1999); *Walker v. Boys and Girls Clubs of America*, 38 F. Supp. 2d 1326, 1337 (M.D. Ala. 1999).

Similarly, Petitioner has failed to present any evidence to overcome the strong inference that someone within the protected age group (e.g., Mr. Pitts, Mr. McMaster, and Ms. Soto-Chairez) would not discriminate against other group members based on age. *See Brown v. CSC Logic, Inc.*, 82

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7. Indeed, in his deposition, Petitioner admitted that he and Ms. Soto-Chairez are the same age. (R. 499).

F.3d 651, 658 (5th Cir. 1996) (finding that the fact that the decision maker was over 40 years old strengthened the "same actor" inference in Plaintiff's ADEA lawsuit); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1001 (5th Cir. 1996) (Garza, concurring) (stating that there was no evidence of age discrimination where the decision makers, the retained employee, the replacement employee, and the plaintiff were all over the age of 40); *accord Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991); *Wathen v. Allisen Engine Co.*, 102 F. Supp. 2d 1015, 1025 (S.D. Ind. 2000); *Coblentz v. Glickman*, No. Civ. A. 98-3645, 1999 WL 816266, at *7 (E.D. La. Oct. 13, 1999); *Jones v. University of Texas*, No. CA 3:97-CV-0845-R, 1998 WL 460283, at *10 (N.D. Tex. Jul. 29, 1998). Petitioner presented no evidence to counter these inferences of nondiscrimination.

In addition, Petitioner presented no evidence that would overcome the presumption of nondiscrimination under the "same actor" doctrine. In this case, the same Metro manager, David McMaster, hired Petitioner and recommended Petitioner's discharge in little more than two years. (R. 422-23, 476, 503). Under the "same actor" doctrine, a presumption of nondiscrimination arises where the same manager hires and discharges a minority employee within a short period of time. *See Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 320 n.3 (5th Cir. 1997); *Nieto v. L & H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997); *Brown v. CSC Logic Inc.*, 82 F.3d 651, 658 (5th Cir. 1996); *Coleman v. Exxon Chemical Corp.*, 162 F. Supp. 2d 593, 630 (S.D. Tex. 2001); *Tiemeyer v. Quality Publ., Inc.*, 144 F. Supp. 2d 727, 736-737 (S.D. Tex. 2001); *Martin v. Kroger Co.*, 65 F. Supp. 2d 516, 551 (S.D. Tex. 1999). In his deposition, Petitioner admitted that David McMaster hired him and was also one of the individuals who recommended that Petitioner's employment

with Metro be terminated. (R. 412, 422-23, 476). Simply stated, Petitioner failed to present or identify any evidence of race or age discrimination to overcome the presumption that Mr. McMaster did *not* discriminate against him based on race or age. Therefore the District Court properly granted Metro summary judgment on Petitioner's discharge claims.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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